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No. 83-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRAVIS MILLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Illinois Appellate Court correctly determined that any alleged defect in the indictment, which petitioner failed to challenge in the trial court, did not prejudice the petitioner and that the resulting conviction could be pleaded in bar of subsequent prosecution.

2. Whether the Illinois Appellate Court correctly determined that the admission of the testimony of correctional officers identifying the petitioner as one of the inmates shown in a videotape depicting the destruction of prison property during a disturbance was proper as an aid to the jury in their determination of the identification issue.

3. Whether the Illinois Appellate Court correctly determined that the trial court's finding that petitioner's conduct caused serious physical harm to the inmate who was killed was not a reversible error where all other aggravating factors fully supported the sentence imposed.

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OPINION BELOW

The Appellate Court of Illinois, Fourth District affirmed petitioner's conviction for destruction of property while participating in a prison disturbance. The opinion is reported at 119 Ill. App. 3d 21, 456 N.E.2d 262 (4th Dist. 1983) and is set out in full in the petition for a writ of certiorari as an appendix. On December 7, 1983, petitioner's petition for a rehearing was denied by the Appellate Court and on April 3, 1984, petitioner's petition for leave to appeal was denied by the Illinois Supreme Court.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. § 1257. As treated more fully below, however, the respondent submits that no good reason exists for this Court to exercise its sound judicial discretion and grant the petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioner's summary of the evidence presented at trial is adequate to apprise this Court of the nature of that evidence, however, respondent will refer to additional evidence presented by citation to the record where it is necessary for an understanding of the respondent's argument.

REASONS FOR DENYING THE WRIT

I.

THE ILLINOIS APPELLATE COURT CORRECTLY DETERMINED THAT ANY ALLEGED DEFECT IN THE INDICTMENT, WHICH PETITIONER FAILED TO CHALLENGE IN THE TRIAL COURT, DID NOT PREJUDICE THE PETITIONER AND THAT THE RESULTING CONVICTION COULD BE PLEADED IN BAR OF SUBSEQUENT PROSECUTION.

The petitioner contends that the indictment in the instant case did not contain all of the elements of the of-

fense charged and consequently his conviction must be vacated. The petitioner did not challenge the sufficiency or validity of the indictment at any time prior to appeal.

The indictment in the instant case stated that:

> The Grand Jury of Livingston County charges that [petitioner] committed the offense of: correctional code violation on or about July 29, 1982, at a location within Livingston County, to wit: Pontiac Correctional Center, Pontiac, Illinois in that: being a person committed to the Department of Corrections, he caused or participated in the destruction of property during a disturbance at the Pontiac Correctional Center by knowingly tearing conduit off pipes and damaging other property, of the State of Illinois, Pontiac Correctional Center, in violation of Section 1003-6-4(a) of Chapter 38 of the Illinois Revised Statutes.

(C. 5) The pertinent portion of the section cited states:

> § 3-6-4. Enforcement of Discipline—Escape. (a) A committed person who . . . while participating in any disturbance, demonstration or riot, causes, directs or participates in the destruction of any property is guilty of a Class 2 felony.

The petitioner argues that the indictment did not allege that he was participating in a disturbance when he caused or participated in the destruction of the property and, therefore, the indictment failed to state an offense.

The Illinois Supreme Court has held that the omission of an element does not *per se* render a charge void and when challenged for the first time on appeal, a charge will be held "sufficient if it apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and allow the pleading of a resulting conviction as a bar to future prosecution arising out of the same conduct." *People v. Pujoue*, 61 Ill. 2d 335, 339, 335 N.E.2d 437 (1975). In *Pujoue*, the defendant was convicted

of the unlawful use of weapons under a statute which made it an offense when a person:

> Carries or possesses in a vehicle or on or about his person within the corporate limits of a city, village or incorporated town, except when on his land or in his own abode or fixed place of business, any loaded pistol, revolver or other firearm.

Ill. Rev. Stat., 1973, ch. 38, par. 24-1(a)(10). The court held that the failure to allege that the revolver was loaded in the complaint at issue was not fatal as it found from the record that defense counsel treated the complaint as charging a violation of the statute specified in the complaint and that the failure to allege that the weapon was loaded did not prejudice the preparation of the defense.

In the instant case, the Illinois Appellate Court specifically stated that it viewed the petitioner's challenge to the sufficiency of the indictment "in the posture of the failure of the defense to raise the issue in the trial court." *People v. Starks and Miller*, 119 Ill. App. 3d 21, 24, 456 N.E.2d 262, 264 (4th Dist. 1983). Applying the standard announced in *Pujoue*, the appellate court found that any claimed defect was not prejudicial to petitioner and that the resulting conviction could be pleaded in bar of any subsequent prosecution.

Petitioner concedes that the indictment was sufficient for the purposes of double jeopardy but asserts that the wording of the indictment was insufficient to apprise him of the offense charged with the requisite specificity so as to enable him to properly prepare a defense. He does not, however, indicate what possible defense he was unable to prepare or present. Indeed, petitioner took the stand and not only denied that he tore any pipe off the wall, but denied that he had participated in the disturbance. (R. 224) Petitioner also asserts that *Pujoue* is inapplicable,

as the prosecution there was initiated by a criminal complaint while it was commenced by an indictment in the instant case. This is a distinction without merit as the Illinois Supreme Court has applied the same standard of review for indictments challenged for the first time on appeal. *See, People v. Gilmore*, 63 Ill. 2d 23, 344 N.E.2d 456 (1976).

Finally, petitioner seeks to obtain review by this Court on the grounds that the ruling of the Illinois Appellate Court is in conflict with prior decisions of federal courts. He cites to three decisions, all of which involved challenges to the sufficiency of federal grand jury indictments. *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038 (1962); *United States v. Edrington*, 726 F.2d 1029 (5th Cir. 1984); *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980). These cases, however, are not controlling with respect to the constitutional sufficiency of a state indictment. Even where a state adopts a grand jury system, all the constitutional requirements which bind the federal government to certain procedures in criminal cases have not been applied to state proceedings. *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221 (1972). States are only required by the Fourteenth Amendment to give defendants fair notice of the charges against them, *see, Cole v. Arkansas*, 333 U.S. 196, 68 S.Ct. 514 (1948) and to observe the prohibition against double jeopardy, *see, Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056 (1969). Moreover, even the federal courts have consistently acknowledged that failure to object until after the verdict dictates that the challenged indictment be construed liberally and not held invalid absent a showing of actual prejudice. *See, Hagner v. United States*, 285 U.S. 427, 52 S.Ct. 417 (1932); *United States v. Previte*, 648 F.2d 73 (1st Cir. 1981); *United States v. Thompson*, 356 F.2d 216 (2nd

Cir. 1965); *United States v. Norman*, 391 F.2d 212 (6th Cir. 1968), *cert. denied*, 390 U.S. 1014, 88 S.Ct. 1265 (1968); *United States v. Logwood*, 360 F.2d 905 (7th Cir. 1966); *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099, 97 S.Ct. 1118 (1977). *Compare, Russell v. United States, supra* (motions to quash the indictments brought prior to trial and preserved for review).

In the instant case, the indictment included the date and location of the offense and a precise statement of the destructive acts alleged to have been committed by the petitioner. By any fair construction, the element of participation in a disturbance could be reasonably inferred from the plain language that the petitioner caused the destruction of property "during a disturbance" at the previously identified correctional center. Additionally, the specific statute is cited in the indictment and it has been held that "[t]he indictment or information does not have to expressly allege each element if the statute is referred to in the information or indictment, and the missing element is set forth in the statute." *United States v. Pou*, 484 F. Supp. 972 (S.D. Fla. 1979).

Accordingly, petitioner has failed to establish a due process violation as the indictment fairly apprised the petitioner of the charge to which he was subject and of the basic facts upon which it was found and provided adequate protection for double jeopardy purposes.

II.

THE ADMISSION OF THE TESTIMONY OF CORRECTIONAL OFFICERS IDENTIFYING THE PETITIONER AS ONE OF THE INMATES SHOWN ON A VIDEOTAPE DEPICTING THE DESTRUCTION OF PRISON PROPERTY DURING A DISTURBANCE WAS PROPER AS AN AID TO THE JURY IN THEIR DETERMINATION OF THE IDENTIFICATION ISSUE.

Petitioner challenges the admission of testimony by three correctional officers identifying the petitioner based upon their viewing of a videotape of the disturbance. Specifically, petitioner complains that these officers were not in any better position than the jury to determine whether he was one of the persons appearing in the tape and that the admission of the officer's testimony invaded the province of the jury and denied him his right to have his guilt or innocence determined by the jury. The respondent submits that review by this Court is unnecessary as the court below gave full consideration to this evidentiary question and its conclusion is fully supported by the facts.

The Illinois Appellate Court characterized the testimony of the officers as lay testimony of persons familiar with the petitioner and his co-defendant. It then examined two federal cases dealing with the introduction of lay witness testimony identifying an accused as one depicted in surveillance photos, noting that the issue was the application of Rule 701 of the Federal Rules of Evidence. The court observed that in *United States v. Calhoun*, 544 F.2d 291 (6th Cir. 1976), the Court of Appeals awarded a new trial because the lay witness identifying the defendant in a photo was his parole officer and this fact improperly interjected the defendant's parole status into the trial. The court also observed that in *United States v. Butcher*, 557 F.2d 666 (9th Cir. 1977), where the appearance of the defendant at trial more closely resembled the individual

depicted in the surveillance photo than it resembled his appearance when the identifying officers last saw him, the Court of Appeals found that the admission of the evidence was not error of constitutional dimension.

The Illinois Appellate Court then cited to *People v. Mixon*, 129 Cal. App. 3d 118, 180 Cal. Rptr. 772 (1982) and *State v. Jamison*, 93 Wash. 2d 794, 613 P.2d 776 (1980). These decisions, the court found, indicated that lay testimony could be said to aid the trier of fact in determining the identity issue when the surveillance photograph "is not a clear depiction of the subject or the defendant's appearance at the time of trial is different from his appearance at the time of the crime." *People v. Starks and Miller*, 456 N.E.2d at 265. In *Mixon*, the court found that the lay testimony was helpful and could aid the jury in identification as the surveillance photo was not a clear depiction of the subject and the defendant had changed his appearance before trial. In *Jamison*, the court found the lay witnesses' familiarity with the defendant's appearance not sufficient to support the admission of their identification testimony where the jury can compare the photo with the defendant who is in their presence. However, the *Jamison* court went on to observe that:

> In reaching this conclusion, however, we do not suggest that opinion testimony of identification based on knowledge of a defendant's appearance at or near the time of taking a surveillance photograph necessarily is inadmissible. Where such knowledge can actually assist the jury in correctly understanding matters that are not within their common experience, such opinion testimony is admissible. Here there was no evidence that, for example, the photographs failed to clearly or accurately depict the robber, or that defendant's appearance had changed or had been altered

> prior to trial or that he had certain peculiarities not readily comparable under trial conditions.

613 P.2d at 779.

Having examined the considerations reflected in these cases, the Illinois Appellate Court examined the facts of the instant case. It concluded first that "there was no prejudice from having the correctional officers testify because the jury would otherwise have been fully aware that the defendants were convicted criminals." *People v. Starks and Miller*, 456 N.E.2d at 265. The court then observed that there was no indication that the petitioner's or his co-defendant's appearances had changed by the time of trial, however, it found that:

> In this case there is an additional element referred to in *Mixon* but not involved in the Federal cases. The tape was such that the persons stated to be defendants were somewhat in the background of the picture, making it more difficult for jurors to make identification. This case is also different than those cases in which still pictures were used. Here the scene shown was a moving one. One familiar with the defendants' mannerisms and body movements would be better able to determine whether either defendant was shown in the videotape than would a juror who had only seen defendants in the court room.

456 N.E.2d at 266. Accordingly, the court concluded that the lay testimony was "an aid to the jury in resolving the issue of identification and did not invade the province of jury." *Id.*

Finally, any impropriety in the admission of the expert testimony did not constitute error of constitutional dimension. The jury was allowed to examine the videotape and was free to make its own determination. Further, petitioner was positively identified as one of the inmates who

pulled the pipe off the wall by an eyewitness to the offense. (R. 112-114) The testimony of this witness was sufficient to establish the defendant's guilt beyond a reasonable doubt, despite the fact that the witness was a fellow inmate who originally said he didn't see anything and who had some good conduct credit against his sentence restored after he came forward with information about the incident. (R. 117-120, 124) *See People v. Mack*, 107 Ill. App. 3d 164, 62 Ill. Dec. 869, 437 N.E.2d 396, 401 (4th Dist. 1982).

Moreover, the defendant's testimony regarding his activities on the day of the incident was substantially impeached. He testified that he came back to his gallery after lunch at about 12:00 or 12:30 p.m., went to his cell, and that no one told him to lock up. (R. 219, 221, 230) He further stated that the disturbance started after his gallery was locked up, and that he observed it with the mirror in his cell. (R. 224) He denied telling investigating agents that he didn't observe anything. (R. 231) Watson, a correctional officer on duty that day, testified that he went to petitioner's gallery shortly after noon because everyone had not locked up. He observed the petitioner hanging out on the gallery and told him to lock up in his cell, but petitioner did not do so and continued to walk about the gallery. (R. 136, 260-261) McKinney, an investigating agent, testified that he interviewed the petitioner a week after the incident and petitioner told him the gallery was locked up and that he hadn't seen anything. (R. 253-255)

The identification testimony of the correctional officers under the particular facts and circumstances of this case was properly admitted. Alternatively, even if it were error to admit the testimony, the error was harmless beyond a reasonable doubt. Accordingly, this petition for writ of certiorari should be denied.

III.

THE TRIAL COURT'S FINDING THAT PETITIONER'S CONDUCT CAUSED SERIOUS PHYSICAL HARM TO THE INMATE WHO WAS KILLED DID NOT CONSTITUTE REVERSIBLE ERROR WHERE ALL OTHER AGGRAVATING FACTORS FULLY SUPPORTED THE SENTENCE IMPOSED.

Petitioner contends that the trial court's finding that petitioner's conduct caused the death of another inmate was not supported by the record and that consideration of this factor in sentencing constituted a due process violation. The respondent submits that the Illinois Appellate Court correctly concluded that in light of the many aggravating factors considered in sentencing, there was no reversible error.

The evidence presented at trial indicated that the petitioner had pulled a pipe off the prison walls, had broken the pipe into a number of pieces, and had passed those pieces through the bars of a gate separating the petitioner's gallery from the flag areas of the prison. The pipe was subsequently used by other inmates as weapons in a fight between two rival gangs. (R. 349-350, 352-353, 355-356) After this fight, 30 inmates required medical attention and one inmate, Orlando Lopez, was killed. (R. 354-355) The fight occurred directly in front of the gallery in which the defendant was housed. (R. 357)

In addition to finding that the defendant's conduct caused serious physical harm to the inmate who was killed, the trial court found that the defendant was likely to commit other crimes, that there were no grounds tending to excuse or justify the conduct, and that he had not made progress towards becoming a law abiding citizen while in prison. (R. 362-363) The court also noted that the defendant was imprisoned following the conviction for

attempt armed robbery for which he had been sentenced to four years' imprisonment. (R. 363-364, 382) The court further noted that the defendant's probation for this prior offense had been revoked. (R. 363) The court then found that a sentence was necessary to deter others from participating in disturbances while in prison and that something beyond the normal prison disciplinary proceedings was required. (R. 364-365) Finally, the court found that the defendant was eligible for an extended term as a repeat offender but stated that the offense was not heinous. (R. 365)

The Illinois Appellate Court determined that:

> The record does not support the trial court's finding that the defendants' conduct caused serious physical harm to the inmate who was killed in that the evidence did not show a connection between the portion of the conduit torn by [the petitioner] and passed by [the co-defendant] and the wounds suffered by the inmate. However, the court's finding that the defendants intended that the torn material be used as a weapon could have properly been inferred from the evidence. The complained-of finding was but one of many aggravating factors considered. No contention was made at sentencing that the court was considering improper aggravating factors. No reversible error occurred.

People v. Starks and Miller, 456 N.E.2d at 267. Under Illinois law, sentencing is a matter of judicial discretion and absent an abuse of this discretion, the sentence may not be altered upon review. *People v. Perruquet*, 68 Ill. 2d 149, 368 N.E.2d 882 (1977). In the instant case, the reviewing court did not exercise its power to reduce sentence as it found no reversible error. Where error, if any, is harmless in light of the record, no sentencing is constitutionally required. *Herron v. United States*, 551 F.2d 62 (5th Cir. 1977). Petitioner's assertion that the trial

court's finding was highly prejudicial and a clear abuse of discretion is without merit and, accordingly, this petition should be denied.

CONCLUSION

For all the foregoing reasons, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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